

No. 621.

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

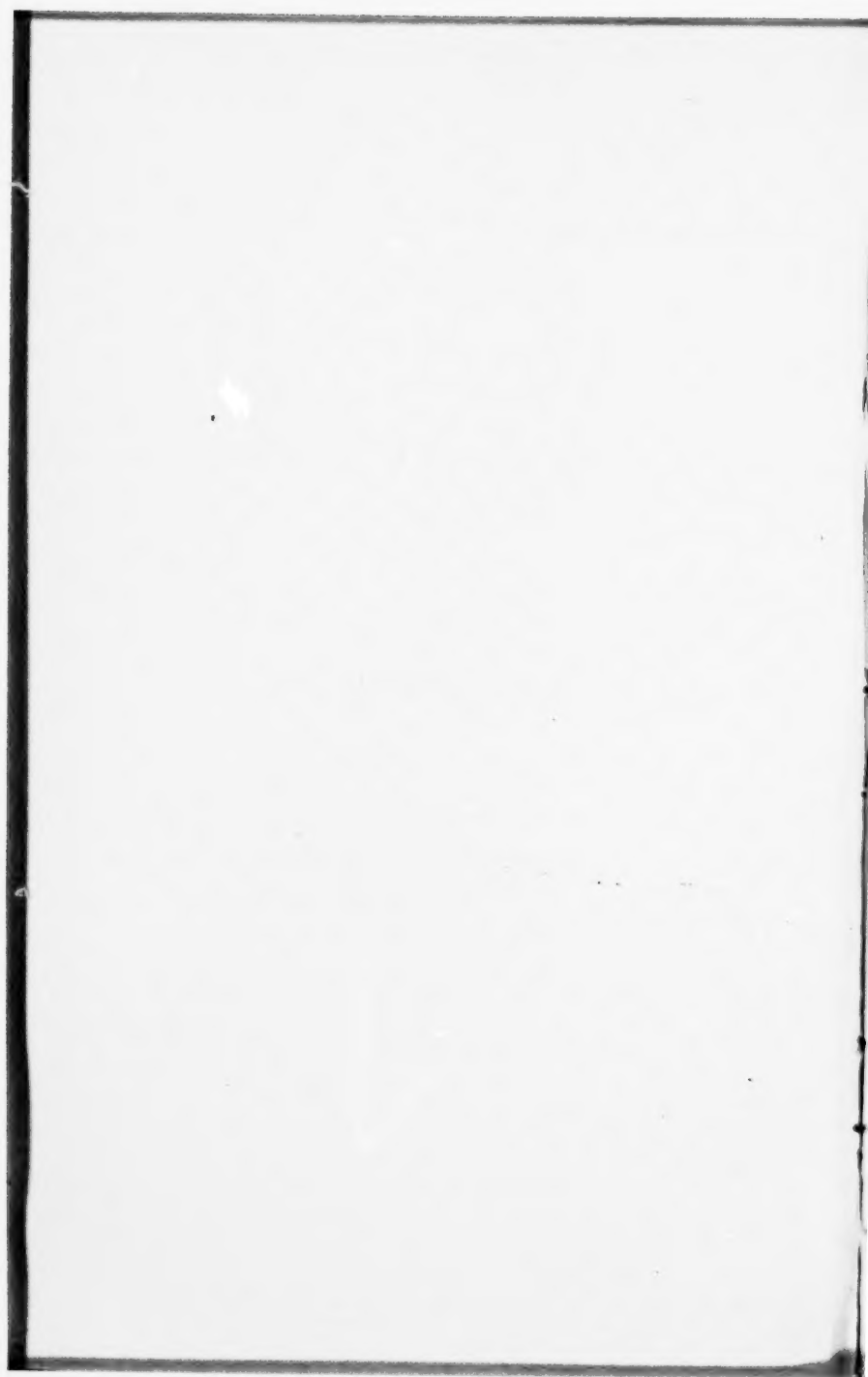
vs.

FOSTER L. DAVIS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE TERRITORY OF HAWAII.

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a In the District Court of the United States in and for the District and Territory of Hawaii.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
FOSTER L. DAVIS, DEFENDANT. } No. 1179.

Transcript of record.

1 *Names and addresses of attorneys.*

For plaintiff, the United States of America: S. C. Huber, Esq., United States district attorney, Honolulu, Hawaii.

For defendant, Foster L. Davis: Breckons and Parsons, 1-2 Brewer Building, 817 Fort Street, Honolulu, Hawaii; E. C. Peters, Esq., 210 McCandless Building, Bethel Street, corner King Street, Honolulu, Hawaii; A. D. Larnach, Esq., 602 Sangenwald Building, Honolulu, Hawaii; Charles S. Davis, Esq., 203 Bank of Hawaii Building, Honolulu, Hawaii; L. M. Straus, Esq., 848 Kaahumanu Street, Honolulu, Hawaii.

2 In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
FOSTER L. DAVIS, DEFENDANT. } No. 1179.

Clerk's statement.

Time of commencing cause: April 5, 1916, indictment filed.

Names of original parties: Plaintiff, The United States of America; defendant, Foster L. Davis.

Dates of filing of pleadings: April 5, 1916, indictment; May 23, 1916, demurrer.

Time when argument on demurrer was had and decision thereon: The above entitled cause came on for argument on the demurrer to the indictment in the United States District Court for the Territory of Hawaii, before the Honorable William W. Morrow, judge of the United States Circuit Court of Appeals for the Ninth Circuit, especially assigned to and presiding in this cause, on May 24, 1916. Thereafter, on May 29, 1916, the Honorable William W. Morrow rendered decision sustaining the demurrer to the indictment.

3 Pleadings on appeal: June 26, 1916, petition for writ of error; June 26, 1916, assignment of errors; June 26, 1916, notice of petition for writ of error; June 27, 1916, writ of error; June 27, 1916, order allowing writ of error; June 27, 1916, bill of

exceptions; June 27, 1916, citation; June 27, 1916, præcipe for transcript.

UNITED STATES OF AMERICA,
Territory of Hawaii, ss:

I, George R. Clark, clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing to be a full, true, and correct statement showing the time of commencement of the above-entitled suit, the names of the original parties thereto, the several dates when the respective pleadings were filed, and account of the proceedings showing the time when the decision herein on the demurrer to the indictment was rendered and the judge rendering same in the cause The United States of America vs. Foster L. Davis, Criminal Number 1179, in the United States District Court for the District of Hawaii.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court this 2nd day of August, A. D. 1916.

[SEAL.]

GEORGE R. CLARK,
Clerk, U. S. District Court, Territory of Hawaii.

4 *Order filing indictment and order for issuance of bench warrant.*

(Clemons, presiding judge.)

From the minutes of the United States District Court: Wednesday, April 5th, 1916, vol. 9, part 2, folio 1175. (Title of court and cause.)

The grand jury came into court on this day and by its foreman returned a true bill of indictment against said defendant charging violation of section 99 of the Penal Code. Thereupon the court ordered said indictment filed and that a bench warrant issue herein.

5 (Stamped:) Arraigned, Apr. 6/16. Plea, ————
(Sgd.) G. R. Clark, clerk.

UNITED STATES OF AMERICA,
District of Hawaii, ss:

In the United States District Court for the Territory of Hawaii, at the October term thereof, A. D. 1915.

First count.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oath present that Foster L. Davis, on the ninth day of January, in the year of our Lord nineteen hundred and fourteen, and on all other days thereafter to and including the twenty-ninth day of May,

A. D. 1914, was then and there an officer of the United States and of a court of the United States, to-wit, a deputy clerk of the United States District Court for the Territory of Hawaii, and an assistant of an officer of the United States and of a court of the United States, to-wit, of the clerk of the United States District Court for the Territory of Hawaii, A. E. Murphy being then and there clerk of the said United States District Court for the Territory of Hawaii, and the said Foster L. Davis being then and there one of the deputy clerks of said court; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the twenty-ninth day of May, A. D. 1914, did then and there have in his possession and under his control certain moneys, to-wit, the sum of five hundred and seventy-six dollars and ninety-five cents (\$576.95), of the value of five hundred and seventy-six dollars and ninety-five cents (\$576.95), any more particular description of which is to the grand jurors unknown,

6 which said moneys had been received by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer and assistant on divers days from and including the ninth day of January, A. D. 1914, to and including the twenty-ninth day of May, A. D. 1914, which said moneys he, the said Foster L. Davis, then and there held in trust in his official capacity aforesaid, and which said moneys he, the said Foster L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; and the said Foster L. Davis did then and there, on or about the said twenty-ninth day of May, A. D. 1914, in said Territory of Hawaii and within the jurisdiction of said court, unlawfully and wilfully and feloniously fail forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depository of the United States; and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, embezzled, and converted by the said Foster L. Davis, as aforesaid, being moneys of some persons other than the United States, and being the moneys that had been deposited with the clerk of the United States District Court for the Territory of Hawaii by parties to suits, actions, and proceedings in said court, other than proceedings in bankruptcy, to pay and to secure the payment of costs in such proceedings, between the ninth day of January, A. D. 1914, and the twenty-ninth day of May, A. D. 1914, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,
United States Attorney.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Foster L. Davis, on the ninth day of January, in the year of our Lord nineteen hundred and fourteen, and on all other days thereafter to and including the twenty-ninth day of May, A. D. 1914, was then and there an officer of the United States and of a court of the United States, to-wit, a deputy clerk of the United States District Court for the Territory of Hawaii, and an assistant of an officer of the United States and of a court of the United States, to-wit, of the clerk of the United States District Court for the Territory of Hawaii, A. E. Murphy being then and there clerk of the said United States District Court for the Territory of Hawaii, and the said Foster L. Davis being then and there one of the deputy clerks of said court; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the twenty-ninth day of May, A. D. 1914, did then and there have in his possession and under his control certain moneys, to-wit, the sum of four hundred and forty-five dollars (\$445.00), of the value of four hundred and forty-five dollars (\$445.00), any more particular description of which is to the grand jurors unknown, which said moneys had been received by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer and assistant on divers days from and including the ninth day of January, A. D. 1914, to and including the twenty-ninth day of May, A. D. 1914, which said moneys he, the said Foster L.

8 Davis, then and there held in trust in his official capacity aforesaid, and which said moneys be, the said Foster L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; and the said Foster L. Davis did then and there on or about the said twenty-ninth day of May, A. D. 1914, in said Territory of Hawaii, and within the jurisdiction of said court, unlawfully and wilfully and feloniously fail forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depository of the United States; and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, embezzled, and converted by the said Foster L. Davis, as aforesaid, being moneys of some persons other than the United States, and being the moneys that had been deposited with the clerk of the United States District Court for the Territory of Hawaii by paries to proceedings in bankruptcy in said court to pay and to secure the payment of costs in such proceedings, between the ninth day of January, A. D. 1914, and the twenty-ninth day of May, A. D.

1914, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,
United States Attorney.

9

Third count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Foster L. Davis, on the thirtieth day of May, in the year of our Lord nineteen hundred and fourteen, and on all other days thereafter to and including the thirty-first day of July, A. D. 1914, was then and there an officer of the United States and of a court of the United States, to wit, a deputy clerk of the United States District Court for the Territory of Hawaii, and an assistant of an officer of the United States and of a court of the United States, to wit, of the clerk of the United States District Court for the Territory of Hawaii, A. E. Murphy being then and there clerk of the said United States District Court for the Territory of Hawaii, and the said Foster L. Davis being then and there one of the deputy clerks of said court; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the thirty-first day of July, A. D. 1914, did then and there have in his possession and under his control certain moneys, to wit, the sum of three hundred and twenty-one dollars and thirty cents (\$321.30), of the value of three hundred and twenty-one dollars and thirty cents (\$321.30), any more particular description of which is to the grand jurors unknown, which said moneys had been received by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer and assistant on

10 divers days from and including the thirtieth day of May, A. D. 1914, to and including the thirty-first day of July, A. D. 1914, which said moneys he, the said Foster L. Davis, then and there held in trust in his official capacity aforesaid, and which said moneys he, the said Foster L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; and the said Foster L. Davis did then and there, on or about the said thirty-first day of July, A. D. 1914, in said Territory of Hawaii and within the jurisdiction of said court, unlawfully and wilfully and feloniously fail forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depository of the United States; and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, embezzled, and converted by the said Foster L. Davis, as aforesaid, being moneys of some persons other than the United States, and being the moneys

that had been deposited with the clerk of the United States District Court for the Territory of Hawaii by parties to suits, actions, and proceedings in said court, other than proceedings in bankruptcy, to pay and to secure the payment of costs in such proceedings, between the thirtieth day of May, A. D. 1914, and the thirty-first day of July, A. D. 1914, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,
United States Attorney.

11

Fourth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Foster L. Davis, on the first day of August, in the year of our Lord nineteen hundred and fourteen, and on all other days thereafter to and including the thirty-first day of December, A. D. 1914, was then and there an officer of the United States and of a court of the United States, to wit, a deputy clerk of the United States District Court for the Territory of Hawaii, and an assistant of an officer of the United States and of a court of the United States, to wit, of the clerk of the United States District Court for the Territory of Hawaii, A. E. Murphy being then and there clerk of the said United States District Court for the Territory of Hawaii, and the said Foster L. Davis being then and there one of the deputy clerks of said court; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the thirty-first day of December, A. D. 1914, did then and there have in his possession and under his control certain moneys, to wit, the sum of one hundred dollars and fifty-five cents (\$100.55), of the value of one hundred dollars and fifty-five cents (\$100.55), any more particular description of which is to the grand jurors unknown, which said moneys had been received by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer and assistant on divers days from and including the first day of August, A. D. 1914, to and including the thirty-first day of December, A. D. 1914,

12 which said moneys he, the said Foster L. Davis, then and there held in trust in his official capacity aforesaid, and which said moneys he, the said Foster L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; and the said Foster L. Davis did then and there, on or about the said thirty-first day of December, A. D. 1914, in said Territory of Hawaii and within the jurisdiction of said court, unlawfully and wilfully and feloniously fail forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer, nor with the

Assistant Treasurer, nor with a designated depository of the United States; and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, embezzled, and converted by the said Foster L. Davis, as aforesaid, being moneys of some persons other than the United States, and being the moneys that had been deposited with the clerk of the United States District Court for the Territory of Hawaii by parties to suits, actions, and proceedings in said court, other than proceedings in bankruptcy, to pay and to secure the payment of costs in such proceedings, between the first day of August, A. D. 1914, and the thirty-first day of December, A. D. 1914, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,
United States Attorney.

13

Fifth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Foster L. Davis, on the thirtieth day of May, in the year of our Lord nineteen hundred and fourteen, and on all other days thereafter to and including the thirty-first day of December, A. D. 1914, was then and there an officer of the United States and of a court of the United States, to wit, a deputy clerk of the United States District Court for the Territory of Hawaii, and an assistant of an officer of the United States and of a court of the United States, to wit, of the clerk of the United States District Court for the Territory of Hawaii, A. E. Murphy being then and there clerk of the said United States District Court for the Territory of Hawaii, and the said Foster L. Davis being then and there one of the deputy clerks of said court; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the thirty-first day of December, A. D. 1914, did then and there have in his possession and under his control certain moneys, to wit, the sum of eight hundred and ten dollars (\$810.00) of the value of eight hundred and ten dollars (\$810.00), any more particular description of which is to the grand jurors unknown, which said moneys had been received by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer and assistant on divers days from and including the thirtieth day of May, A. D. 1914, to and including the thirty-first

14 day of December, A. D. 1914, which said moneys he, the said Foster L. Davis, then and there held in trust in his official capacity aforesaid, and which said moneys he, the said Foster L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; and the said Foster L. Davis did then and there,

on or about the said thirty-first day of December, A. D. 1914, in said Territory of Hawaii and within the jurisdiction of said court, unlawfully and wilfully and feloniously fail forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depository of the United States; and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, embezzled, and converted by the said Foster L. Davis, as aforesaid, being moneys of some persons other than the United States, and being the moneys that had been deposited with the clerk of the United States District Court for the Territory of Hawaii by parties to proceedings in bankruptcy in said court to pay and to secure the payment of costs in such proceedings, between the thirtieth day of May, A. D. 1914, and the thirty-first day of December, A. D. 1914; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,
United States Attorney.

15

Sixth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Foster L. Davis, on the seventeenth day of November, in the year of our Lord nineteen hundred and fifteen, and on all other days thereafter, to and including the thirtieth day of November, A. D. 1915, was then and there an officer of the United States and of a court of the United States, to wit, clerk of the United States District Court for the Territory of Hawaii; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the thirtieth day of November, A. D. 1915, did then and there have in his possession and under his control certain moneys, to wit, the sum of eleven hundred and eighty-seven dollars and seven cents (\$1,187.07), of the value of eleven hundred and eighty-seven dollars and seven cents (\$1,187.07), any more particular description of which is to the grand jurors unknown, which said moneys had been received by him in his official capacity aforesaid, and had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer on divers days from and including the seventeenth day of November, A. D. 1915, to and including the thirtieth day of November, A. D. 1915, which said moneys he, the said Foster L. Davis, then and there held in trust in his official capacity aforesaid, and which said moneys he, the said Foster L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; and the said Foster L. Davis did then and there in said Territory of Hawaii, and within the jurisdiction of said

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court, on or about the said thirtieth day of November, A. D. 1915, unlawfully and wilfully and feloniously fail forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer nor with an Assistant Treasurer nor with a designated depository of the United States; and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, embezzled, and converted by the said Foster L. Davis, as aforesaid, being the moneys of some persons other than the United States, and being the moneys that had been deposited with the clerk of the United States District Court for the Territory of Hawaii, and with the said Foster L. Davis, as deputy clerk of said court, by parties to suits, actions, and proceedings in said court, to pay and to secure the payment of costs in such proceedings prior to the said seventeenth day of November, A. D. 1915, and after the sixth day of May, A. D. 1915; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,
United States Attorney.

17

Seventh count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Foster L. Davis, on the fifth day of August, in the year of our Lord nineteen hundred and thirteen, and on all other days thereafter to and including the thirtieth day of August, A. D. 1913, was then and there an officer of the United States and of a court of the United States, to wit, a deputy clerk of the United States District Court for the Territory of Hawaii, and an assistant of an officer of the United States and of a court of the United States, to wit, of the clerk of the United States District Court for the Territory of Hawaii, A. E. Murphy being then and there clerk of the said United States District Court for the Territory of Hawaii, and the said Foster L. Davis being then and there one of the deputy clerks of said court; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the thirtieth day of August, A. D. 1913, did then and there have in his possession and under his control certain moneys, to wit, the sum of forty-eight dollars (\$48.00), of the value of forty-eight dollars (\$48.00), any more particular description of which is to the grand jurors unknown, which said moneys had been received by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer and assistant on divers days from and including the fifth day of August, A. D. 1913, to and including the thirtieth day of August, A. D. 1913, which said moneys

18 he, the said Foster L. Davis, then and there held in trust in his official capacity aforesaid, and which said moneys he, the

said Foster L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; and the said Foster L. Davis did then and there, on or about the said thirtieth day of August, A. D. 1913, in said Territory of Hawaii and within the jurisdiction of said court, unlawfully and wilfully and feloniously fail forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depository of the United States; and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, embezzled, and converted by the said Foster L. Davis, as aforesaid, being moneys of some persons other than the United States, and being the moneys that had been deposited with the clerk of the United States District Court for the Territory of Hawaii by parties to suits, actions, and proceedings in said court, other than proceedings in bankruptcy, to pay and to secure the payment of costs in such proceedings, between the fifth day of August, A. D. 1913, and the thirtieth day of August, A. D. 1913, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,

United States Attorney.

19

Eighth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that Foster L. Davis, on the sixth day of September, in the year of our Lord nineteen hundred and thirteen, and on all other days thereafter to and including the thirtieth day of September, A. D. 1913, was then and there an officer of the United States and of a court of the United States, to wit, a deputy clerk of the United States District Court for the Territory of Hawaii, and an assistant of an officer of the United States and of a court of the United States, to wit, of the clerk of the United States District Court for the Territory of Hawaii, A. E. Murphy being then and there clerk of the said United States District Court for the Territory of Hawaii, and the said Foster L. Davis being then and there one of the deputy clerks of said court; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the thirtieth day of September, A. D. 1913, did then and there have in his possession and under his control certain moneys, to wit, the sum of two hundred and eleven dollars and ten cents (\$211.10), of the value of two hundred and eleven dollars and ten cents (\$211.10), any more particular description of which is to the grand jurors unknown, which said moneys had been received by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer and assistant

on divers days from and including the sixth day of September, A. D. 1913, to and including the thirtieth day of September, A. D.

1913, which said moneys, he, the said Foster L. Davis,
20 then and there held in trust in his official capacity aforesaid, and which said moneys he, the said Foster L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; and the said Foster L. Davis did then and there on or about the said thirtieth day of September, A. D. 1913, in said Territory of Hawaii and within the jurisdiction of said court, unlawfully and wilfully and feloniously fail forthwith to deposit said moneys, as required by law, and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depository of the United States; and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, embezzled, and converted by the said Foster L. Davis, as aforesaid, being moneys of some persons other than the United States, and being the moneys that had been deposited with the clerk of the United States District Court for the Territory of Hawaii by parties to suits, actions, and proceedings in said court, other than proceedings in bankruptcy, to pay and to secure the payment of costs in such proceedings, between the sixth day of September, A. D. 1913, and the thirtieth day of September, A. D. 1913; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,

United States Attorney.

21

Ninth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that Foster L. Davis, on the fifteenth day of March, in the year of our Lord nineteen hundred and thirteen, and on all other days thereafter to and including the twenty-third day of June, A. D. 1913, was then and there an officer of the United States and of a court of the United States, to wit, a deputy clerk of the United States District Court for the Territory of Hawaii, and an assistant of an officer of the United States and of a court of the United States, to wit, of the clerk of the United States District Court for the Territory of Hawaii, A. E. Murphy being then and there clerk of the said United States District Court for the Territory of Hawaii, and the said Foster L. Davis being then and there one of the deputy clerks of said court; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the twenty-third day of June, A. D. 1913, did then and there have in his possession and under his control certain moneys, to wit, the sum of forty dollars (\$40.00), of the value of forty dollars (\$40.00), any more particular description of which is to the grand jurors unknown, which said moneys had been received

by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer and assistant on divers days from and including the fifteenth day of March, A. D. 1913, to and including the twenty-third day of June, A. D. 1913, which said moneys he, the said

22 Foster L. Davis, then and there held in trust in his official capacity aforesaid, and which said moneys he, the said Foster

L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; and the said Foster L. Davis did then and there, on or about the said twenty-third day of June, A. D. 1913, in said Territory of Hawaii and within the jurisdiction of said court, unlawfully and wilfully and feloniously fail forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depository of the United States; and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, embezzled, and converted by the said Foster L. Davis, as aforesaid, being moneys of some persons other than the United States, and being the moneys that had been deposited with the clerk of the United States District Court for the Territory of Hawaii by parties to proceedings in bankruptcy in said court to pay and to secure the payment of costs in such proceedings, between the fifteenth day of March, A. D. 1913, and the twenty-third day of June, A. D. 1913; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,
United States Attorney.

Endorsed: No. 1179. (Title of court and cause.) Indictment for violation of section 99 of the Penal Code. A true bill. (Sgd.) J. Henry Hertsche, foreman grand jury. Filed April 5, 1916. (Sgd.) George R. Clark, clerk.

23 *Proceedings at arraignment, order filing memorandum of judge's disqualification, order releasing defendant on bail, and order of continuance.*

(Clemons, presiding judge.)

From the minutes of the United States District Court. Thursday, April 6, 1916, vol. 9, part 2, folio 1177. (Title of court and cause.)

On this day came the United States by its district attorney Mr. Horace W. Vaughan, and also came the above defendant in person and with counsel, Mr. Robert W. Breckons, and this cause was called for arraignment. Thereupon the indictment herein was read to the said defendant by the clerk. Thereafter the court filed the fol-

lowing memorandum, to wit: In the United States District Court for the Territory of Hawaii, United States of America vs. Foster L. Davis. Memo. of judge's disqualification. I hereby cause the fact of my disqualification in this case to be entered on the records of the court, the grounds of such disqualification being as follows, to wit: (1) That I am or may be a material witness for one or both of the parties; (2) that I am and was so connected with the party defendant that it would be improper, in my opinion, to sit on the trial of this case by reason (a) of the confidential relation between us in our respective official capacities as officers of this court, and (b) by reason of my having gone over in detail with the defendant and with the special examiner of the Department of Justice, Mr. Henry McConnell, the matters and things, books and accounts, which it is presumed were laid before the grand jury as the basis of this indictment and may be laid before the trial jury in the trial of the charges made in said indictment." It was then ordered by the court

that the clerk send a certified copy of the foregoing memo. of judge's disqualification to the Hon. Wm. B. Gilbert, senior circuit judge of the Ninth Circuit Court, Northern District of California, at Portland, Oregon, in accordance with the provisions of sec. 20, Judicial Code. Thereafter, on motion of Mr. Breckons and consent of Mr. Vaughan, the court ordered that said defendant be released upon his furnishing a satisfactory bond in the sum of \$500.00, and that said defendant be given until April 8, 1916, to furnish said bond. Thereupon Mr. Breckons asked that the names of Mr. Charles S. Davis, Mr. A. D. Larnach, Mr. E. C. Peters, and Mr. L. M. Straus be entered as counsel for the above defendant, and this cause was by the court continued until called up for plea.

25 *Proceedings at the designation of Honorable William W. Morrow, circuit judge of the United States for the Ninth Circuit, to preside as district judge of this court.*

(Morrow, Circuit Judge, presiding.)

From the minutes of the United States District Court, vol. 10, page 87, Tuesday, May 23, 1916.

In the matter of the designation of William W. Morrow, circuit judge of the United States for the Ninth Circuit, to preside as judge of this court.

The court ordered that the designation of the above-named judge be spread in full on the minutes of this court in words and figures following, that is to say:

"It having been made to appear to me by the certificate of the clerk of the United States District Court for the Territory of Hawaii that the Honorable Charles F. Clemons, judge of said court, has filed with the clerk of said court his certificate that he, the said judge of said court, for reasons in the certificate stated, which reasons I find sufficient in law, deems himself unable to preside with

absolute impartiality in the trial of the cause of the United States v. Foster L. Davis, case No. 1179;

"Now, in consideration of said certificate and for the further reason that in my judgment the public interest so requires, I hereby designate and appoint the Honorable William W. Morrow, circuit judge of the United States for the Ninth Circuit, to preside upon the trial of said cause of United States v. Foster L. Davis in the United States District Court for the Territory of Hawaii, and to hold said last-named court during the months of May, June, and July, 1916, he to have and to exercise within the Territorial jurisdiction of said last-named court the same powers that are vested in the judges thereof.

26 "In the matter of the designation of William W. Morrow, circuit judge of the United States for the Ninth Circuit, to preside as judge of this court.

"Dated San Francisco, Cal., this 12th day of May, 1916.

(Sgd.)

"WM. B. GILBERT,

"Senior United States Circuit Judge for the Ninth Circuit."

27 *Order of continuance to May 24, 1916, for argument on demurrer.*

(Morrow, presiding judge.)

From the minutes of the United States District Court: Tuesday, May 23, 1916, vol. 10, folio 88. (Title of court and cause.)

On this day came the United States by its district attorney Mr. S. C. Huber, and also came the above defendant in person and without his counsel. Thereupon the defendant stated that his counsel, Mr. E. C. Peters, was unable to be present through being engaged in the trial of a case in the Territorial Circuit Court, and requested a continuance to May 24, 1916, at 10 o'clock a. m., for argument on demurrer, which was by the court so ordered.

28 In the United States District Court for the District of Hawaii, at the April term thereof, A. D. 1916.

THE UNITED STATES OF AMERICA	}
<i>vs.</i>	
FOSTER L. DAVIS, DEFENDANT.	

Demurrer.

Comes now Foster L. Davis, the defendant above named, and demurs to the indictment heretofore and on to-wit, the 5th day of April, A. D. 1916, presented against him, and to each and every count thereof upon the ground that said indictment, and each and every count thereof, and the matters therein contained, in manner

and form as the same are stated and set forth, do not charge any offense against the laws of the United States, and are not sufficient in law to be answered unto by this defendant.

Wherefore this defendant prays that he be hence dismissed.

Dated this 22nd day of May, A. D. 1916.

(Sgd.)

ROBT. W. BRECKONS &

C. F. PARSONS,

E. C. PETERS,

A. D. LARNACH &

CHAS. S. DAVIS,

Attorneys for Defendant.

Endorsed: No. 1179. (Title of court and cause.) Demurrer. Filed May 23, 1916, at 9 o'clock and 45 minutes a. m. George R. Clark, clerk. By (Sgd.) Ray B. Rietow, deputy clerk.

29 *Proceedings at argument on demurrer, order taking demurrer under advisement, and order of continuance until called up for decision.*

(Morrow, presiding Judge.)

From the minutes of the United States District Court Wednesday, May 24, 1916, vol. 10, folio 89. (Title of court and cause.)

On this day came the United States, by its district attorney, Mr. S. C. Huber, and also came the above defendant in person and with his counsel, Messrs. E. C. Peters, C. S. Davis, A. D. Larnach, and L. M. Strauss, and this cause was called for argument on demurrer to the indictment herein. Thereupon and after argument the case was taken under advisement and ordered continued until called up for decision.

30 *Proceedings at decision sustaining demurrer, quashing indictment, and order discharging defendant and cancelling his bond.*

(Morrow, presiding Judge.)

From the minutes of the United States District Court, Monday, May 29, 1916, vol. 10, folio 96. (Title of court and cause.)

On this day came the United States, by its district attorney, Mr. S. C. Huber, and also came the above defendant in person and with his counsel, Messrs. E. C. Peters, A. D. Larnach, C. S. Davis, and this cause was called for decision on demurrer to the indictment. Thereupon the court read and filed its decision sustaining said demurrer, quashing the indictment herein, and ordered said defendant discharged and his bond cancelled, to which ruling Mr. S. C. Huber entered an exception.

31 In the District Court of the United States for the Territory of Hawaii.

UNITED STATES OF AMERICA, PLAINTIFF, }
v. } No. 1179.
FOSTER L. DAVIS, DEFENDANT.

Indictment for violation of section 99 of the Penal Code of the United States.

S. C. Huber, United States attorney, for the plaintiff.

E. C. Peters, R. W. Breckons, C. S. Davis, A. D. Larnach, and L. M. Strauss, for the defendant.

MORROW, circuit judge: The indictment in this case contains nine counts. In counts numbered 1, 2, 3, 4, 5, 7, 8, and 9, it is charged in substance that during certain specified periods the defendant was a deputy clerk for the United States District Court for the Territory of Hawaii, and as such deputy clerk he had in his possession and under his control certain moneys which he was required by law

32 forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; that he failed forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depository of the United States; that he retained, embezzled, and converted to his own use the moneys mentioned; that the moneys so retained, embezzled, and converted to his own use were moneys deposited with him as deputy clerk of said court by parties to suits, actions, and proceedings in said court to pay and to secure the payment of costs in such proceedings. In count numbered 6, it is alleged that during a certain other period mentioned the defendant was the clerk of the United States District Court for the Territory of Hawaii, and as such clerk he had in his possession and under his control certain moneys which he was required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; that he failed forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depository of the United States; that he retained, embezzled, and converted to his own use the moneys mentioned; that the moneys so retained, embezzled, and converted to his own use were moneys deposited with him as clerk of said court by parties to suits, actions, and proceedings in said court to pay and to secure the payment of costs in such proceedings.

It is nowhere charged that any moneys so deposited with the defendant, as clerk or deputy clerk, were moneys of the United States. On the contrary it is specifically alleged in all the counts of the indictment that the moneys so deposited with the defendant, as clerk and deputy clerk, were moneys of persons other than the United States.

33 In counts numbered 1, 3, 4, 7, and 8 it is alleged that the moneys so deposited with the defendant as deputy clerk were deposited with him by persons other than the United States who were parties to suits, actions, and proceedings in said court, other than proceedings in bankruptcy, and the moneys were to pay and to secure the payment of costs in such proceedings. In counts numbered 2, 5, and 9 it is alleged the moneys so deposited with said defendant as deputy clerk were deposited by persons other than the United States who were parties to proceedings in bankruptcy in said court, and the moneys were to pay and to secure the payment of costs in such proceedings. In count numbered 6 it is alleged that the moneys deposited with defendant as clerk were deposited by persons other than the United States who were parties to suits, actions, and proceedings in said court, and the deposits were made to pay and to secure the payment of costs in such proceedings, without distinguishing whether the proceedings were in bankruptcy or in suits and actions between individuals.

To this indictment the defendant has interposed a demurrer in which the objection is made that it does not charge any offense against the laws of the United States and is not sufficient in law to be answered.

Section 99 of the Penal Code of the United States (section 5504 of the Revised Statutes) provides as follows:

“Whoever, being a clerk or other officer of a court of the United States, shall fail forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court or received by the officers thereof, with the Treasurer, Assistant Treasurer, or a designated depository of the United States, in the name and to the credit of such court, or shall retain or convert to his own use or to
34 the use of another any such money, is guilty of embezzlement and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both; but nothing herein shall be held to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.”

The language of the several counts of the indictment indicates that they are all based upon this section of the Penal Code, and the indictment is so endorsed. Do the facts alleged bring the charges within the terms of the statute?

There are moneys required by law to be paid to and received by the clerk or deputy clerk of the district court in his official capacity as clerk or deputy clerk, which moneys when received the clerk or deputy clerk is required forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States. These are moneys which he may receive by virtue of his office and are required by law to be paid into court and forthwith deposited with the Treasurer, Assistant Treasurer, or a designated depository of the United States; and the moneys so deposited can only be with-

drawn by order of the judge or judges of said court. (See sections 995, 996, 4543, and 4545 of the Revised Statutes.) The last sentence of the statute providing for the delivery of the deposited money upon security clearly identifies the deposited there referred to as money deposited in court as distinguished from money paid to the clerk as costs or as security for costs. Are the moneys paid to and received by the clerk or deputy clerk as deposits, made by individuals to pay and to secure the payment of costs, also required by law to be forthwith deposited with the Treasurer, Assistant Treasurer, or a designated depository of the United States?

It should be stated preliminarily that there is no law requiring individuals to make any deposit of moneys to secure in advance the payment of costs in any action, suit, or proceeding in court, except in bankruptcy.

Section 828 of the Revised Statutes prescribes in detail the fees which a clerk of the court may earn for his official services in all cases. These fees range in amount from 10¢ to \$3.00, and a specific sum is fixed for each individual service rendered, however small. Take for example the following items in the long schedule of fees:

"For filing and entering every declaration, plea, or other paper, ten cents.

"For issuing a writ of summons or subpœna, twenty-five cents.

"For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ, except writ of venire or a summons or subpœna for a witness, one dollar.

"For making dockets and indexes, issuing venire, taxing costs, and all other services on the trial or argument of a cause where issue is joined and testimony given, three dollars."

It was found in practice inconvenient and impracticable to collect these fees from litigants at the time each service was rendered; thereupon the courts provided by rule for a deposit by them with the clerk of the court of a sum of money to pay and secure the payment of costs of court as they accrued. This method of securing the payment of costs, although not provided for by law, has had the sanction of general adoption by the courts, long usage, and recognition by the Department of Justice in regulations.

In bankruptcy proceedings, the deposit to secure cost is recognized by law. Section 51 of the act of July 1, 1898, providing a uniform system of bankruptcy throughout the United States (30 Stat., 559), provides that—

"Clerks shall respectively * * * collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; * * * and within ten days after each case has been closed (the clerk shall) pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition."

Section 52 of the act provides that—

“Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.”

There is no law requiring these prepaid fees in bankruptcy or in other cases to be forthwith deposited with the Treasurer, Assistant Treasurer, or a designated depository of the United States; but the clerk may, as a matter of convenience and for his own safety and security, deposit the moneys so received in bankruptcy and other cases to his individual account or to his account as clerk of the court in any bank, although he is not required by law to make such a deposit anywhere in the name or to the credit of the court. In other words, it is plainly and distinctly not a court fund, nor a fund belonging to the United States.

37 Prior to the act of March 3, 1841 (5 Stat., 421, 428), the fees and emoluments received by the clerks of the Supreme and District Courts of the United States were their own property; but since the passage of that act the amounts retained by such clerks have been specified sums as compensation, together with office and other expenses allowed by the accounting officers of the Treasury, the overplus to be paid into the Treasury. The purpose of this statute was manifestly to enable the accounting officers of the Treasury to limit the office expenses of the clerks of the courts. It follows that a system of accounting has been required and provided in dealing with the fees, compensation, allowances, and accountability of the clerks of courts.

This necessity for a proper system of accounting is further emphasized by the fact that the United States, although a party to many suits, actions, and proceedings in the courts of the United States, makes no deposits to pay or to secure the payment of fees earned by the clerks in United States cases, nor does the United States, since the act of 1841, pay the clerks any fees for services rendered the United States in such cases, unless the fees collected by the clerks in all cases shall be less than the sum allowed them by law for annual compensation and office expenses. In other words, a clerk is entitled to retain out of his earned fees the compensation allowed him by law, together with the amount allowed him for his office expenses; but should his earnings, after the deduction of his compensation and necessary office expenses, exceed the said sum upon any half-yearly emolument return, the surplus must be paid
38 into the Treasury of the United States upon a warrant from the Attorney General. (Section 844 of the Revised Statutes.)

Pursuant to this feature of the law, the clerk is required to make a quarterly return to the Department of Justice of all fees of every kind earned by him from the United States during the quarter covered by the return; and if at the end of the half-year, upon an adjustment of his accounts, it is found that he has earned in fees from

individuals a sum more than sufficient to pay his semiannual compensation and expenses of his office, then he must pay the excess into the Treasury of the United States, and he receives nothing from the United States for his services in United States cases; but if the sum earned in fees from individuals is not sufficient to pay his semiannual compensation and expenses of office, the United States will allow him the difference between the sum earned and the amount of his semiannual compensation, including expenses of office.

The act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30, 1900 (31 Stat., 141, 159), provides in section 86 that "The said district judge shall appoint a clerk for said court at a salary of three thousand dollars per annum." But this act does not relieve the clerk from the duty of making a quarterly return of his earnings in United States cases, nor from the duty of making the half-yearly emolument return of all fees and emoluments of his office; nor does it relieve the accounting officers of the Treasury from the duty of auditing and allowing the clerk, over and above his personal compensation provided in the act, his necessary office expenses, including clerk hire; and the act does not require that deposits for costs shall be paid into the Treasury prior to such return and audit. The relation of the clerk to

such deposits is, therefore, precisely the same in Hawaii as in
39 other districts under the general statute in that behalf.

This method of compensation and allowances for expenses requires a system of accounting, carried on by the accounting officers of the Treasury, to ascertain and determine what portion of the fees earned by the clerk may be retained by him as compensation and for expenses of his office, and what portion he will be required to pay into the Treasury as surplus earnings of his office.

It is not alleged in the indictment that any of the amounts charged to have been embezzled by the defendant was shown by any return of his to be a surplus of fees and emoluments of his office as clerk and deputy clerk, over and above the compensation and allowances authorized by law to be retained by him, or that the accounting officers of the Treasury had so found, or that he had been directed by the Attorney General, after such audit, to pay into the Treasury or to the credit of the Treasurer any of said amounts as surplus fees and emoluments of his office; and such an allegation, if it had been made, would have been wholly inconsistent with the charge that upon receiving the deposits, it was his duty forthwith to deposit the same with the Treasurer, Assistant Treasurer, or a designated depository of the United States.

We find the statutes with respect to the clerks' fees fully and clearly discussed and explained in *United States v. Mason*, 218 U. S., 517, 531, where the Supreme Court had under consideration charges of embezzlement preferred against a clerk of the district court for failure to faithfully keep the public moneys which had come into

his possession and control by virtue of his office, said public moneys being a portion of the surplus fees and emoluments of his office. The court held that even the duty to pay the surplus fees, as shown by the return or audit, was not governed by the statutes relating to embezzlement. The court said further:

“The amount with which the clerk is chargeable upon his accounting is not the ‘public money’ or ‘the money or property of the United States,’ within the meaning of their provisions. The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount payable when the return is made the clerk is not trustee but debtor. Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent.”

The United States attorney contends, however, that the counts in the indictment charging the defendant as deputy clerk with the offense of embezzling the moneys deposited with him in the cases mentioned distinguishes the charges in such counts from the charges in the Mason case, wherein the defendant was clerk of the court. The contention is that the deputy clerk, having a specific allowance for his services as deputy clerk, has no interest in the deposits to be determined by an accounting, and he is therefore required forthwith to deposit such moneys with the Treasurer, Assistant Treasurer, or a designated depository of the United States.

The objection to this view of the case is that we are dealing with deposits with the clerk, and not with the compensation of the clerk or deputy clerk. The question is, What was the duty of the clerk or deputy clerk with respect to these deposits? Was it their duty, when the money was received, to forthwith deposit the same to the credit of the court in the depositories mentioned? If they were not so required, and such is our conclusion, it makes no difference whether the moneys were received by the clerk or a deputy clerk. With respect to a duty of *this* character, the law does not distinguish between a clerk and a deputy clerk; their duty to the fund is precisely the same.

The United States attorney further contends that the indictment may be supported under section 97 of the Penal Code (act of February 3, 1879, 20 Stat., 280). That section provides:

“Any officer connected with or employed in the Internal-Revenue Service of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such

officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both."

42 The first objection we find to the application of this statute to the charges contained in the indictment is that the charges in the indictment do not follow the language of the statute, and the second is that the facts constituting the charge of embezzlement are set forth with particularity in the various counts of the indictment, and we have already found that they do not constitute embezzlement, nor do they, in our opinion, show that the defendant wrongfully converted to his own use any money or property which came into his possession or under his control in the execution of his office or employment. On the contrary, we have found that he rightfully came into the possession of the moneys charged to have been received by him, and that he did not convert such moneys to his own use except in so far as authorized by statute to take and hold possession of such moneys until a return and audit had determined his further duty with respect to these deposits.

As said by the Supreme Court in the *Mason* case, page 529:

"There has thus been established a distinct system with respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office and are received in an official capacity. This consideration, however, does not aid the prosecution, for they were attached to the office before the statute of 1841, when they belonged to the clerk without any duty on his part to account for any portion of them. The fees and emoluments stand in a different category from other moneys which he may receive by virtue of his office, as, for example, moneys paid into court." (Revised Statutes, §§ 995, 996.)

Again, on page 530, the court says:

43 "None of the statutes relating to embezzlement of moneys or property of the United States which we have quoted affords a basis for the counts in question." The act of February 3, 1879 (20 Stat., 280), the original of section 97 of the Penal Code, is one of the statutes quoted by the Supreme Court on page 521.

The court proceeds:

"There may be an honest difference of opinion with regard to the amount, the payment of which, from the fees collected, may properly be allowed. Provision has been made for the examination of the matter and for the ascertainment of the amount due. Pending such audit there would be no justification for indicting the clerk as an embezzler upon the allegation that he had in his hands a surplus

which he had converted to his own use. It is not a question of public moneys which are to be deposited as such and are to be disbursed in accordance with the Treasury system. A fixed compensation is to be retained, the expenses of the office are to be defrayed, and the question of the necessity of the expenses is to be passed upon; and the clerk is not in default until he refuses or fails to make his return or to pay over the surplus shown by his return to exist or the amount found upon the audit of his accounts to be payable.

"We have not before us a case where a clerk has refused or failed to make the return required by statute or to pay over the surplus shown by his return to exist or established by the audit."

The case of the United States v. MacMillan, 209 Fed., 266, 271, is the title to nine actions at law in a district court of Illinois to recover upon alleged breaches of official bonds. Six of these
44 actions were against clerks of the district court, and three against the clerk of the Circuit Court of Appeals. The breaches alleged consisted in the failure of the clerks to account and pay over to the United States certain specified sums of money received by the clerks as interest on moneys which had been paid to the clerks as deposits to secure the payment of fees in bankruptcy and other cases. The deposits were identical with the deposits in the present case. To the several declarations, pleas were interposed setting forth the proceedings under which the deposits were made with the clerk. The United States demurred to their pleas on the ground that they constituted no defense to the actions. The court overruled the demurrers, following the Mason case and holding that the United States had no right or title to any interest the clerk might receive on the fund pending his semiannual return, either as increment of the fund or as an emolument of the office, and as such to be accounted for. The case appears to us to be an extreme one in favor of the right of the clerk to the exclusive and unqualified possession and use of all deposits made with him to secure the payment of costs until such time as he makes his emolument return and an accounting is had as required by the statute, but we are of the opinion that the decision is justified under the law as declared by the Supreme Court in the Mason case.

It follows that, in our opinion, the indictment in the present case does not state an offense against the United States. The demurrer must therefore be sustained and the indictment quashed, and it is so ordered.

45 Endorsed: No. 1179. (Title of court and cause.) Opinion on demurrer to indictment. Filed May 29, 1916. (Sgd.) George R. Clark, clerk.

46 In the United States District court for the Territory of Hawaii. The United States of America, plaintiff, vs. Foster L. Davis, defendant. No. 1179. Petition for writ of error. S. C. Huber, United States attorney. S. B. Kemp, assistant United States attorney.

47 In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 1179.
<i>vs.</i>	
FOSTER L. DAVIS, DEFENDANT.	

Petition for writ of error.

To the Honorable W. W. Morrow, judge of the Circuit Court of Appeals for the Ninth Circuit, especially assigned to and presiding in the above-entitled cause:

The above-named United States of America, plaintiff, feeling aggrieved by the order made and entered in the above-entitled cause on the 29th day of May, A. D. 1916, sustaining defendant's demurrer to the indictment, does hereby petition for an order allowing petitioner to prosecute a writ of error to the Supreme Court of the United States, for the reasons set forth in the assignment of errors, filed herewith, and prays that its petition for said writ of error may be allowed, and that transcript of the record, proceedings, and documents upon which said order was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such court in such cases made and provided.

Dated, Honolulu, Hawaii, June 23, A. D. 1916.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,

By (Sgd.) S. C. HUBER,
United States Attorney.

48 (Sgd.) S. B. KEMP,
*Assistant United States Attorney, Counsel
for said Plaintiff and Petitioner.*

Due and legal service of the foregoing petition for writ of error is hereby accepted, and the receipt of a copy thereof hereby acknowledged. All done this 24th day of June, A. D. 1916.

FOSTER L. DAVIS,
By (Sgd.) E. C. PETERS,
His Attorney.

Endorsed: No. 1179. (Title of court and cause.) Petition for writ of error. Filed June 26, 1916, at 3 o'clock 30 minutes, p. m. (Sgd.) George R. Clark, clerk.

49 In the United States District Court for the Territory of Hawaii. The United States of America, plaintiff, vs. Foster L. Davis, defendant. No. 1179. Assignment of errors. S. C. Huber, United States attorney. S. B. Kemp, Assistant United States attorney.

50 In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	}	No. 1179.
<i>vs.</i>		
FOSTER L. DAVIS, DEFENDANT.		

Assignment of errors.

Now comes The United States of America, plaintiff above named, and by S. C. Huber, United States attorney, and S. B. Kemp, assistant United States attorney, its attorneys, and files the following assignment of errors upon which it will rely, upon its prosecution of a writ of error in the above-entitled cause from the order sustaining defendant's demurrer to indictment made by this honorable court on the 29th day of May, A. D. 1916.

I.

That the United States District Court for the Territory of Hawaii erred in sustaining the demurrer, interposed by the defendant, to the indictment filed in this cause.

II.

That the court erred in holding that the facts constituting the charge of embezzlement, set forth with particularity in the various counts of the indictment, do not constitute embezzlement.

51 III.

That the court erred in holding that the indictment did not charge an offense under section 97 of the Penal Code.

IV.

That the court erred in holding that the facts alleged in the indictment do not show that the defendant wrongfully converted to his own use any money or property which came into his possession or under his control in the execution of his office or employment.

V.

That the court erred in holding that defendant did not convert to his own use the moneys charged to have been received by him, except

insofar as authorized by statute to take and hold possession of such moneys until a return and audit had determined his further duty with respect to these deposits.

VI.

That the court erred in holding that the principles of the "Mason" case (U. S. v. Mason, 218 U. S. Rep., 517) apply to a deputy clerk as well as to a clerk.

VII.

That the court erred in holding that the law does not distinguish between a clerk and a deputy clerk with respect to their rights in the funds created by moneys deposited in the office of the clerk as security for costs by parties litigant, and that the rights of a clerk and a deputy clerk, in relation to such deposit funds, are precisely the same.

52

VIII.

That the court erred in holding that a deputy clerk of a United States District Court was not one of the persons included in the classes punishable under section 97 of the Penal Code.

IX.

That the court erred in holding that the moneys deposited for costs, as alleged in the indictment, was not included in the term "money" as used in section 97 of the Penal Code, the embezzlement and the conversion to one's own use of which is punishable thereunder.

X.

That the court erred in denying applicant's application for a rehearing and reargument of said demurrer.

XI.

That the court erred in making said order sustaining defendant's demurrer to the indictment herein, in this—that said order was and is contrary to law.

Wherefore plaintiff prays that said order be reversed and that the United States District Court for the Territory of Hawaii be directed to enter an order reversing the decision of the lower court in said cause.

By (Sgd.)

UNITED STATES OF AMERICA, PLAINTIFF,
S. C. HUBER,*United States Attorney.*

(Sgd.)

S. B. KEMP,

Assistant United States Attorney.

53 Due and legal service of the foregoing assignment of errors is hereby accepted and receipt of a copy thereof acknowledged. All done this 24th day of June, A. D. 1913.

FOSTER L. DAVIS,
By (Sgd.) E. C. PETERS,
His Attorney.

(Endorsed:) No. 1179. (Title of court and cause.) Assignment of errors. Filed June 26, 1916, at 3 o'clock and 30 minutes p. m. (Sgd.) George R. Clark, clerk.

54 In the United States District Court for the Territory of Hawaii. The United States of America, plaintiff, vs. Foster L. Davis, defendant. No. 1179. Notice of petition for writ of error. S. C. Huber, United States attorney. S. B. Kemp, assistant United States attorney.

55 In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	}	No. 1179.
<i>vs.</i>		
FOSTER L. DAVIS, DEFENDANT.		

Notice of petition for writ of error.

To Foster L. Davis, the above-named defendant, and to his attorneys:

You, and each of you, will please take notice hereby that on June 27th, A. D. 1916, we shall present to said court the petition for writ of error herein, and the assignment of errors herein, and shall move said court to allow said writ of error and to direct the issuance of the same, and of the citation herein. Copies of said petition for writ of error and of the assignment of errors herein are made a part of this notice, attached hereto and served herewith.

Dated Honolulu, Hawaii, June 24th, A. D. 1916.

	THE UNITED STATES OF AMERICA,
(Sgd.)	By S. C. HUBER, <i>United States Attorney,</i>
(Sgd.)	S. B. KEMP, <i>Assistant United States Attorney,</i> <i>Counsel for Said Plaintiff.</i>

56 Due and legal service of the foregoing notice is hereby accepted and receipt of copies of the various papers therein referred to acknowledged. All done this 24th day of June, A. D. 1916.

FOSTER L. DAVIS,
By (Sgd.) E. C. PETERS,
His Attorney.

Endorsed: No. 1179. (Title of court and cause.) Notice of petition for writ of error. Filed June 26, 1916, at 3 o'clock 30 minutes, p. m. (Sgd.) George R. Clark, clerk.

57 *Proceedings at presentation of petition for writ of error and order allowing writ of error.*

(William W. Morrow, circuit judge, presiding.)

From the minutes of the United States District Court, vol. 10, page 118, Tuesday, June 27th, 1916. (Title of court and cause.)

On this day came the United States by its district attorney, Mr. S. C. Huber, and also came the above defendant in person and with his counsel, Mr. E. C. Peters, and this cause was called for presentation of petition for writ of error. Thereupon counsel for defendant objected to the allowance of same, which objection was by the court overruled, whereupon the court signed an order allowing writ of error.

58 In the United States District Court for the Territory of Hawaii. The United States of America, plaintiff, vs. Foster L. Davis, defendant. No. 1179. Writ of error. S. C. Huber, United States attorney. S. B. Kemp, assistant United States attorney.

Filed June 27, 1916, at 1 o'clock and 58 minutes p. m. George R. Clark, clerk.

59 In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 1179.
vs.	
FOSTER L. DAVIS, DEFENDANT.	

Writ of error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable W. W. Morrow, Justice of the United States Circuit Court of Appeals for the Ninth Circuit, especially assigned to and presiding in the above entitled case in the United States District Court for the Territory of Hawaii, greeting:

Because the record and proceedings, as also in the giving, making, rendition, entering, and filing of the final order in that certain cause in the aforesaid District Court, before you, between the United States of America, plaintiff and petitioner, and Foster L. Davis, defendant above named, a manifest error hath happened to the great prejudice and damage of said plaintiff, the United States of America, as is said appears by the petition herein.

We being willing that error, if any, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the office of said court in Washington, D. C., within sixty (60) days from and after the date hereof, to be then and there heard, that the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct the errors, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 27th day of June, A. D. 1916.

Attest my hand and the seal of the United States District Court for the Territory of Hawaii, at the clerk's office at Honolulu, in said Territory, on the day and year last above written.

[SEAL.]

GEORGE R. CLARK,
*Clerk United States District Court
for the Territory of Hawaii.*

Allowed this 27th day of June, A. D. 1916.

WM. W. MORROW,

Justice of the United States Circuit Court of Appeals for the Ninth Circuit, especially assigned to and presiding in the above entitled cause.

Due and legal service of the above writ is hereby accepted and the receipt of a copy thereof acknowledged.

All done this 27th day of June, A. D. 1916.

FOSTER L. DAVIS,
By E. C. PETERS,
His Attorney.

61 In the United States District Court for the Territory of Hawaii. The United States of America, plaintiff, vs. Foster L. Davis, defendant. No. 1179. Order allowing writ of error. S. C. Huber, United States attorney. S. B. Kemp, assistant United States attorney.

62 In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
FOSTER L. DAVIS, DEFENDANT. } No. 1179.

Order allowing writ of error.

At a stated term, to-wit, the April term, A. D. 1916, of the above entitled court, held at its court room in the city of Honolulu, in the aforesaid district and Territory, on the 27th day of June, A. D. 1916;

Present: The Honorable W. W. Morrow, a justice of the United States Circuit Court of Appeals for the Ninth Circuit, especially assigned to and presiding in said cause.

Upon the petition of the plaintiff and petitioner above named, and on motion of S. C. Huber, Esq., United States attorney for said district, and S. B. Kemp, Esq., assistant United States district attorney for said district, counsel for the above named plaintiff and petitioner:

It is hereby ordered that a writ of error to the Supreme Court of the United States from the order sustaining defendant's demurrer, heretofore filed and entered herein, be, and the same is hereby, allowed, and that a certified transcript of the record, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States.

63 Dated, Honolulu, Hawaii, this 27th day of June, A. D. 1916.
(Sgd.) WM. W. MORROW,
Judge presiding at said court.

Due and legal service of the above order is hereby accepted and receipt of a copy thereof acknowledged. All done this 27th day of June, A. D. 1916.

By (Sgd.) FOSTER L. DAVIS,
E. C. PETERS, *His Attorney.*

Endorsed: No. 1179. (Title of court and cause.) Order allowing writ of error. Filed June 27, 1916, at 1 o'clock 58 minutes p. m. (Sgd.) George R. Clark, clerk.

64 In the United States District Court for the Territory of Hawaii. The United States of America, plaintiff, vs. Foster L. Davis, defendant. No. 1179. Citation. S. C. Huber, United States attorney. S. B. Kemp, assistant United States attorney.

Filed June 27, 1916, at 1 o'clock and 58 minutes p. m. George R. Clark, clerk.

65 In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 1179.
vs.	
FOSTER L. DAVIS, DEFENDANT.	

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to Foster L. Davis and to Robert W. Breckons, Charles S. Davis, E. C. Peters, L. M. Straus, and A. D. Larnach, his attorneys:

You, and each of you, are hereby cited and admonished to be and appear in the Supreme Court of the United States of America at

Washington, in the District of Columbia, within sixty (60) days from the date hereof, pursuant to writ of error filed in the clerk's office of the above-named District Court of the United States in and for the Territory and District of Hawaii, wherein the United States of America is plaintiff and petitioner in error and you are defendant in error, to show cause, if any there be, why the final order in said writ of error mentioned, and from which said writ of error has been allowed, should not be corrected and speedy justice should not be done to the parties in that behalf.

66 Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 27th day of June, A. D. 1916, and of the independence of the United States the one hundred and fortieth.

WM. W. MORROW,
Justice of the United States Circuit Court of Appeals for the Ninth Circuit, especially assigned to and presiding in the above-entitled cause.

Attest:

[SEAL.]

GEORGE R. CLARK,
Clerk U. S. District Court.

Due and legal service of the foregoing citation is hereby accepted and receipt of a copy thereof hereby acknowledged. All done this 27th day of June, A. D. 1916.

FOSTER L. DAVIS,
By E. C. PETERS,
His Attorney.

66a In the United States District Court for the Territory of Hawaii. The United States of America, plaintiff, vs. Foster L. Davis, defendant. No. 1179. Bill of exceptions. S. C. Huber, United States attorney. S. B. Kemp, assistant United States attorney.

66b In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 1179.
vs.	
FOSTER L. DAVIS, DEFENDANT.	

Bill of exceptions.

Be it remembered that on the 5th day of April, A. D. 1916, at a stated term of the above court, to wit, the October term for the year 1915, in the city and county of Honolulu, in and for the district and Territory of Hawaii, before the honorable Charles F. Clemons, district judge for the Territory of Hawaii, a bill of indictment in nine

counts was duly returned by the grand jury, which said grand jury had been duly empaneled, sworn, and charged at the term aforesaid, charging the defendant herein, Foster L. Davis, with the crime of embezzlement; that said indictment was duly filed by the clerk of said court on April 5th, 1916.

That the first count of said indictment is as follows, to wit:

66c UNITED STATES OF AMERICA,

District of Hawaii, ss:

In the United States District Court for the Territory of Hawaii at the October term thereof, A. D. 1915.

First count.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath, present that Foster L. Davis, on the ninth day of January, in the year of our Lord nineteen hundred and fourteen, and on all other days thereafter to and including the twenty-ninth day of May, A. D. 1914, was then and there an officer of the United States and of a court of the United States, to wit, a deputy clerk of the United States District Court for the Territory of Hawaii and an assistant of an officer of the United States and of a court of the United States, to wit, of the clerk of the United States District Court for the Territory of Hawaii, A. E. Murphy being then and there clerk of the said United States District Court for the Territory of Hawaii, and the said Foster L. Davis being then and there one of the deputy clerks of said court; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the twenty-ninth day of May, A. D. 1914, did then and there have in his possession and under his control certain moneys, to wit, the sum of five hundred and seventy-six dollars and ninety-five cents (\$576.95), of the value of five hundred and seventy-six dollars and ninety-five cents (\$576.95), any more particular description of which is to the grand jurors unknown, which said moneys had been received by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer and assistant on divers days from and including the ninth day of January, A. D. 1914, to and including the twenty-ninth day of May, 1914, which said moneys he, the said Foster L. Davis, then and there held in trust in his official capacity aforesaid, and which said moneys he, the said Foster L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depositary of the United States; and the said Foster L. Davis did then and there, on or about the said twenty-ninth day of May, A. D. 1914, in said Territory of Hawaii and within the jurisdiction of said court, unlawfully and wilfully and

feloniously fail forthwith to deposit said moneys as required by law and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depositary of the United States; and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, 66d embezzled, and converted by the said Foster L. Davis, as aforesaid, being moneys of some persons other than the United States, and being the moneys that had been deposited with the clerk of the United States District Court for the Territory of Hawaii by parties to suits, actions, and proceedings in said court, other than proceedings in bankruptcy, to pay and to secure the payment of costs in such proceedings, between the ninth day of January, A. D. 1914, and the twenty-ninth day of May, A. D. 1914, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,
United States Attorney.

That the remaining counts of said indictment, except count number six, are substantially the same as count one above set out, differing only in the period of time covered and the amount alleged to have been embezzled; that count six differs from the other eight counts in this: That the defendant was at the time of the alleged offense clerk of said court and not deputy; that it is not deemed necessary for the purpose hereof, that the other counts of the indictment be set out in full.

That defendant was duly arraigned in said cause on the 6th day of April, A. D. 1916.

That thereafter, on the 23rd day of May, A. D. 1916, the said defendant, by his counsel, demurred to said indictment, said demurrer being as follows, to wit:

In the United States District Court for the District of Hawaii, at the April term thereof, A. D. 1916.

THE UNITED STATES OF AMERICA
vs.
FOSTER L. DAVIS, DEFENDANT. }

Demurrer.

Comes now Foster L. Davis, the defendant above named, and demurs to the indictment heretofore and on to wit, the 5th day of 66e April, A. D. 1916, presented against him, and to each and every count thereof, upon the ground that said indictment, and each and every count thereof, and the matters therein contained, in manner and form as the same are stated and set forth, do not charge

any offense against the laws of the United States, and are not sufficient in law to be answered unto by this defendant.

Wherefore this defendant prays that he be hence dismissed.

Dated this 22nd day of May, A. D. 1916.

(Sgd.)

ROBT. W. BRECKONS &
C. F. PARSONS,
E. C. PETERS,
A. D. LARNACH AND
CHAS. S. DAVIS,
Attorneys for Defendant."

Exception number 1.

That thereafter, on the 24th day of May, A. D. 1916, the case came on for further hearing, Honorable W. W. Morrow, a justice of the United States Circuit Court of Appeals for the Ninth Circuit, especially assigned to this case, presiding, the said demurrer was duly argued to the court by counsel for defendant and plaintiff. and thereafter, on the 29th day of May, A. D. 1916, the court rendered its decision ordering that said demurrer be sustained and the indictment quashed, to which order plaintiff took exception, which was duly noted and allowed.

The foregoing bill of exceptions is based on the record and proceedings herein, together with all the pleadings, clerk's notes, and documents on file, including the opinion of the court ruling upon said demurrer, which are all hereby expressly made a part of this bill of exceptions and incorporated herein as fully as if they, and each of them, were actually set out herein in words and figures, and the plaintiff prays that all such pleadings, records, clerk's notes, and

all documents on file relating to said cause, including the indictment, demurrer, and opinion of the court on the demurrer to the indictment, be, by order of the court, incorporated herein as fully as if they, and each of them were actually set out herein in words and figures.

Order allowing bill of exceptions.

Now, to-wit, on this 27th day of June, A. D. 1916, it being a day of the regular term of said United States District Court for the Territory of Hawaii, at the April term thereof, for the year 1916, being the term in which the order referred to in this bill of exceptions was made, the foregoing bill of exceptions being found to be conformable to the truth, and to be a true and correct record of the proceedings and constituting a true and correct bill of exceptions, the same is hereby allowed this 27th day of June, A. D. 1916.

(Sgd.)

WM. W. MORROW,
Justice of the United States Circuit Court of Appeals for the Ninth Circuit, especially assigned to and presiding in the above entitled cause.

Due and legal service of the above bill of exceptions is hereby accepted, and the receipt of a copy thereof acknowledged. All done this 27th day of June, A. D. 1916.

By (Sgd.) FOSTER L. DAVIS,
E. C. PETERS, *His attorney.*

Endorsed: No. 1179. (Title of court and cause.) Bill of exceptions. Filed June 27, 1916, at 1 o'clock 58 minutes p. m. (Sgd.) George R. Clark, clerk.

67 In the United States District Court for the Territory of Hawaii. The United States of America, plaintiff, vs. Foster L. Davis, defendant. No. 1179. Praecept for transcript. S. C. Huber, United States attorney. S. B. Kemp, assistant United States attorney.

68 In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 1179.
<i>vs.</i>	
FOSTER L. DAVIS, DEFENDANT.	

Praecept for transcript.

To the clerk of the above-entitled court:

You will please prepare transcript of the record in this case, to be filed in the office of the clerk of the Supreme Court of the United States of America, under the writ of error, heretofore sued out and perfected, to said court, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

1. Indictment, filed April 5, 1916.
2. Minute entries under date of April 5, 1916, ordering filing of indictment.
3. Minute entries under date of April 6, 1916, showing arraignment of defendant and memorandum of judge's disqualification.
4. Demurrer of defendant, filed May 23, 1916.
- 4½. Designation of Justice William W. Morrow to try this case, as shown by minutes of May 23, 1916.
5. Minute entries under date of May 24, 1916, as to argument on demurrer.
6. Decision of demurrer, including order sustaining demurrer and quashing indictment, filed May 29, 1916.
- 69 7. Minute entries in full under date of May 29, 1916.
8. Petition for writ of error, filed June 26, 1916.
9. Assignment of errors, filed June 26, 1916.
10. Notice of petition for writ of error, etc., filed June 26, 1916.
11. Minute entries under date of June 27, 1916.
12. Writ of error, filed June 27, 1916.

13. Order allowing writ of error, filed June 27, 1916.

14. Citation, filed June 27, 1916.

14½. Bill of exceptions.

15. This præcipe.

Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court of the United States of America and filed in the office of the clerk of said Supreme Court of the United States of America within sixty (60) days from and after the date hereof.

Dated Honolulu, Hawaii, June 27, A. D. 1916.

By (Sgd.) THE UNITED STATES OF AMERICA,
S. C. HUBER,
United States Attorney, and
(Sgd.) S. B. KEMP,
Assistant United States Attorney.

The foregoing præcipe for transcript being presented to the undersigned this 27th day of June, A. D. 1916, the same is hereby approved.

(Sgd.) WM. W. MORROW,
Justice of the United States Circuit Court of Appeals for the Ninth Circuit, especially assigned to and presiding in the above-entitled cause.

70 Due and legal service of the above præcipe for transcript is hereby accepted, and the receipt of a copy thereof acknowledged. All done this 27th day of June, A. D. 1916.

FOSTER L. DAVIS,
By (Sgd.) E. C. PETERS, *His Attorney.*

Endorsed: No. 1179. (Title of court and cause.) Præcipe for transcript. Filed June 27, 1916, at 1 o'clock and 58 minutes p. m. (Sgd.) George R. Clark, clerk.

71 In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
FOSTER L. DAVIS, DEFENDANT. } No. 1179.

Clerk's certificate to transcript of record.

UNITED STATES OF AMERICA,
Territory of Hawaii, ss:

I, George R. Clark, clerk of the United States District Court for the Territory of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 71, inclusive, is a true and complete transcript

of the record and proceedings had in said court in the cause of the United States of America vs. Foster L. Davis, as the same remains of record and on file in my office; and I further certify that I hereto annex the original writ of error and citation.

I further certify that the cost of the foregoing transcript of record is \$21.00, and that said amount has been charged by me in my account against the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of this court this 2nd day of August, A. D. 1916.

[SEAL.]

GEORGE R. CLARK,

Clerk United States District Court, Territory of Hawaii.

(Endorsement on cover:) File No. 25451, Hawaii Territory, D. C. U. S. Term No. 621. The United States of America, plaintiff in error, vs. Foster L. Davis. Filed August 19, 1916. File No. 25451.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 621.
v.	
FOSTER L. DAVIS.	

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE TERRITORY OF HAWAII.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Defendant was indicted in the District Court of the United States for the Territory of Hawaii for embezzling, while acting as clerk and deputy clerk of said court, certain moneys which came into his hands as such official, in violation of sections 97 and 99 of the Penal Code.

A demurrer to the indictment was sustained, the District Court holding, *inter alia*, that the facts

alleged in the indictment do not constitute embezzlement within the meaning of sections 97 and 99 of the Penal Code, because the moneys involved and alleged to have been embezzled do not come within the purview of the funds referred to in those sections.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1916.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 621.
v.	
FOSTER L. DAVIS.	

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE TERRITORY OF HAWAII.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States for the Territory of Hawaii brought under the Criminal Appeals Act of March 2, 1907 (37 Stat. 1246), to review the decision on demurrer to an indictment against the defendant in error, as an assistant of an officer of the United States, to wit, a deputy clerk of the United States District Court for the Territory of Hawaii, for embezzling and converting to his own use certain moneys received by him in his official capacity, said moneys being moneys of some persons other than the United States, in violation of section 97 of the Penal Code (act of February 3, 1879, 20 Stat. 280).

That section provides:

Any officer connected with or employed in the Internal-Revenue Service of the United States, and any assistant of such officer who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States, or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both.

The indictment contained nine counts, which are fully set forth in the record. (Fols. 5-23, pp. 2-12).

The first count is as follows:

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oath present that Foster L. Davis, on the ninth day of January, in the year of our Lord nineteen hundred and fourteen, and on all other days thereafter to and including the twenty-ninth day of May, A. D. 1914, was then and there an officer of the United States and of a court of the United States, to-wit, a deputy clerk of the

United States District Court for the Territory of Hawaii, and an assistant of an officer of the United States and of a court of the United States, to-wit, of the clerk of the United States District Court for the Territory of Hawaii, A. E. Murphy being then and there clerk of the said United States District Court for the Territory of Hawaii, and the said Foster L. Davis being then and there one of the deputy clerks of said court; and the said Foster L. Davis, by virtue of his official capacity aforesaid, on or about the twenty-ninth day of May, A. D. 1914, did then and there have in his possession and under his control certain moneys, to-wit, the sum of five hundred and seventy-six dollars and ninety-five cents (\$576.95), of the value of five hundred and seventy-six dollars and ninety-five cents (576.95), any more particular description of which is to the grand jurors unknown, which said moneys had been received by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color and claim of authority as such officer and assistant on divers days from and including the twenty-ninth day of May, A. D. 1914, which said moneys he, the said Foster L. Davis, then and there held in trust in his official capacity aforesaid, and which said moneys he, the said Foster L. Davis, was then and there required by law forthwith to deposit with the Treasurer or Assistant Treasurer or a designated depository of the United States; and the said Foster L. Davis did then and

there, on or about the said twenty-ninth day of May, A. D. 1914, in said Territory of Hawaii and within the jurisdiction of said court, unlawfully and wilfully and feloniously fail forthwith to deposit said moneys as required by law, and did not deposit said moneys with the Treasurer nor with the Assistant Treasurer nor with a designated depository of the United States, and the said Foster L. Davis did then and there unlawfully and wilfully and feloniously retain and embezzle and convert to his own use the moneys aforesaid, the said moneys so retained, embezzled, and converted by the said Foster L. Davis, as aforesaid, being moneys of some persons other than the United States, and being the moneys that had been deposited with the clerk of the United States District Court for the Territory of Hawaii by parties to suits, actions, and proceedings in said court, other than proceedings in bankruptcy, to pay and to secure the payment of costs in such proceedings, between the ninth day of January, A. D. 1914, and the twenty-ninth day of May, A. D. 1914, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.)

HORACE W. VAUGHAN,
United States Attorney.

The other eight counts are substantially identical with the first count, except the sixth count, which describes the defendant in error as "Clerk" of the United States District Court instead of "Deputy clerk," as he is described in the first and all the other counts save the sixth.

There is a slight variance in the eight counts other than the sixth, in that counts numbered 1, 3, 4, 7, and 8 allege that the moneys deposited with the defendant in error as deputy clerk were so deposited by persons other than the United States who were parties to suits, actions, and proceedings in the said court, *other than proceedings in bankruptcy*, and that the moneys were to pay and to secure the payment of costs in such proceedings; while counts numbered 2, 5, and 9 allege that the moneys so deposited with said defendant as deputy clerk were deposited by persons other than the United States who were parties to *proceedings in bankruptcy* in said court and the moneys were to pay and to secure the payment of costs in such proceedings. (Fol. 23, p. 17, record.)

This variance is, however, not material so far as the issue raised by this writ of error is concerned, as will appear from the sequel.

To this indictment the defendant in error interposed a demurrer upon the ground that it does not charge any offense against the laws of the United States and is insufficient in law. (P. 33, Rec.)

The indictment bore an indorsement on the outside which referred to section 99 of the Penal Code. But as appears from the specification of errors, that section is not before the court upon this writ. And as will more fully appear below, it is the contention of the Government that the indictment sufficiently and with all necessary particularity sets forth a violation of section 97 of the Penal Code (*supra*).

It is the further contention of the Government that the said section 97 of the Penal Code was construed by the district court; that its construction was erroneous; and that under the criminal appeals act the Government is entitled to have the same reviewed by this court.

It becomes, however, important at this point to refer to the theory of the indictment.

Section 99 of the Penal Code reads as follows:

Whoever, being a clerk or other officer of a court of the United States, shall fail forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court or received by the officers thereof, with the Treasurer, Assistant Treasurer, or a designated depository of the United States, in the name and to the credit of such court, or shall retain or convert to his own use or to the use of another any such money, is guilty of embezzlement and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both; but nothing therein shall be held to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

It is evident that the pleader conceived that the offense of the defendant in error was to all intents and purposes the same offense whether described by the language of section 97 (set forth supra) or that of section 99 of the Penal Code, and equally indictable under either section. And with this in mind he

drew his indictment, perhaps somewhat inartificially, to include the provisions of both sections.

Upon the hearing of the demurrer, however, the court concluded that the offense of which the defendant in error was accused was not indictable under section 99 for the reasons set forth at length in the opinion of the district court and fully discussed in the leading case of *United States v. Mason*, 218 U. S. 517, in which Mr. Justice Hughes, writing for a unanimous court, held that as to such moneys the clerk was not a trustee but a debtor, and hence no indictment could be had under that section.

ASSIGNMENTS OF ERROR.

I.

That the United States District Court for the Territory of Hawaii erred in sustaining the demurrer, interposed by the defendant, to the indictment filed in this cause.

II.

That the court erred in holding that the facts constituting the charge of embezzlement, set forth with particularity in the various counts of the indictment, do not constitute embezzlement.

III.

That the court erred in holding that the indictment did not charge an offense under section 97 of the Penal Code.

IV.

That the court erred in holding that the facts alleged in the indictment do not show that the defendant wrongfully converted to his own use any money or property which came into his possession or under his control in the execution of his office or employment.

V.

That the court erred in holding that defendant did not convert to his own use the moneys charged to have been received by him, except in so far as authorized by statute to take and hold possession of such moneys until a return and audit had determined his further duty with respect to these deposits.

VI.

That the court erred in holding that the principles of the "Mason" case (*U. S. v. Mason*, 218 U. S. Rep. 517) apply to a deputy clerk as well as to a clerk.

VII.

That the court erred in holding that the law does not distinguish between a clerk and a deputy clerk with respect to their rights in the funds created by moneys deposited in the office of the clerk as security for costs by parties litigant, and that the rights of a clerk and a deputy clerk, in relation to such deposit funds, are precisely the same.

VIII.

That the court erred in holding that a deputy clerk of a United States District Court was not one of the persons included in the classes punishable under section 97 of the Penal Code.

IX.

That the court erred in holding that the moneys deposited for costs, as alleged in the indictment, was not included in the term "money" as used in section 97 of the Penal Code, the embezzlement and the conversion to one's own use of which is punishable thereunder.

X.

That the court erred in denying applicant's application for a rehearing and reargument of said demurrer.

XI.

That the court erred in making said order sustaining defendant's demurrer to the indictment herein, in this—that said order was and is contrary to law.

THE QUESTIONS INVOLVED.

The assignment of errors and the record present the following questions for consideration:

1. Whether the district court in its opinion construed section 97 of the Penal Code.
2. Whether the indictment alleges sufficient facts and with requisite particularity to constitute a violation of section 97 of the Penal Code.

3. Whether with respect to the operation of that statute there is such a distinction between the rights and duties of the clerk of the United States Court and those of the deputy clerk of the said court as to render the principles of the "Mason" case (*United States v. Mason*, 218 U. S. 517) inapplicable to the deputy clerk.

THE ARGUMENT.

I.

The District Court construed section 97 of the Penal Code and the case is properly before this Court under the Criminal Appeals Act. (Act of March 2, 1907.)

Under the above act, this Court may review a decision of the lower court in case the decision involved the construction of the statute upon which the indictment was based.

To construe a statute is to consider whether the allegations of the indictment set forth acts of the defendant which are denounced or condemned as criminal by the statute.

As was said by this Court in a case involving the question of its jurisdiction under this act:

The court could not have decided as it did that the acts charged are not within the condemnation of the statute, without first ascertaining what it does condemn, which, of course, involved its construction. Indeed it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it. (*United States v. Patten*, 226 U. S. 525, 535.)

And again upon the same question the Court said:

As the District Court held that the acts charged did not fall within the condemnation of the statute, the court necessarily construed the statute and the cases are properly here. *United States v. Birdsall*, 234 U. S. 223, 230. (Citing the Patten case, *supra*.)

And this Court has gone still further in upholding its jurisdiction in the later case of *United States v. Nixon*, 235 U. S. 231, 235, as follows:

There is no claim that it (the indictment) was quashed because of any defect in matter of pleading, and that being true, the ruling on the demurrer that "the indictment does not charge any offense for which the receivers can be held," necessarily involved a decision of the question as to whether there was any statute which punished the acts therein set out. In determining that question it was necessary that the indictment should be referred, not merely to the act mentioned in argument, but to any statute which prohibited the transportation of cattle by the persons in the manner and on the date charged in that indictment. * * *

Nor can a reversal be avoided by the claim that the act of 1913, though applicable to the facts charged in the indictment, had not been construed by the court. For within the meaning of the Criminal Appeals Act (34 Stat. 1246) the statute on which, as matter of law, an indictment is founded, may be misconstrued not only by misinterpreting its language, but by overlooking its existence

and failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms. It is "a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it."

It is respectfully submitted that the language of this case is peculiarly applicable to the case at bar, inasmuch as Judge Morrow has dismissed the indictment upon the ground that it "does not state an offense against the United States," which necessarily not only includes section 99 of the Penal Code but likewise section 97, and under the Nixon case any statute whatever under which an indictment might be predicated upon the allegations hereinunder considered.

II.

The indictment is sufficient in form and particularity.

The provisions of section 97, for convenience, are here repeated.

Any officer connected with or employed in the Internal Revenue Service of the United States, and any assistant of such officer who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of author-

ity as such officer or assistant, whether the same shall be the money or property of the United States, or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than the value of the money and property thus embezzled or converted, or imprisonment not more than ten years, or both.

It is of course immaterial, in the first place, that the United States Attorney, who prepared the indictment in the case at bar endorsed thereon a reference to section 99 of the Penal Code; and also, in the second place, that he seems to have endeavored to incorporate the provisions of both section 97 and section 99 of the Penal Code. Neither fact controls the consideration of this court. (*Williams v. United States*, 168 U. S. 382.)

"Looking to the indictment itself" the Government contends that all the counts thereof, except the sixth (which as we have already indicated is not pressed here because in that count the defendant in error was described as "clerk" instead of "deputy clerk"), may be supported under section 97 of the Penal Code as set forth above.

THE FIRST CHARGE OF INSUFFICIENCY.

With regard to the first conclusion of the court that the charges in the indictment do not follow the language of the statute, we find upon examination of the second portion of the statute, which is the

portion upon which this indictment is based, that its essential features are as follows:

(a) That accused shall be an officer of the United States, or an assistant of such officer.

(b) That he shall embezzle or wrongfully convert to his own use,

(c) Money or property which may have come to his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant.

With these tests of sufficiency in mind we find upon examining the first count of the indictment (and all the other counts except the sixth are identical therewith in these particulars) that it alleges:

1. That Davis, the defendant in error, was during a certain named period an officer of the United States and of a court of the United States, to wit, a deputy clerk of the United States District Court for the Territory of Hawaii and an assistant of an officer of the United States and of a court of the United States, to wit, of the clerk of the United States District Court for the Territory of Hawaii, and,

2. That Davis by virtue of his official capacity * * * did then and there have in his possession and under his control certain moneys (which are described), which said moneys had been received by him in his official capacity aforesaid, and which said moneys had before that time come into his possession and under his control in the execution of his same office, and under color or

claim of authority as such officer and assistant, and,

3. That Davis did then and there unlawfully, and willfully, and feloniously retain and embezzle and convert to his use the money aforesaid.

Taking now the essential allegations of the statute as above outlined and the actual allegations of the indictment as above recited, we find that the allegations of subdivision (1) of the indictment correspond entirely with those of subdivision (a) of the analysis of the statute; and that (2) and (3) of the indictment are in all respects similar to (b) and (c) of the statute with the exception that they are in inverse order, that is to say (2) of the indictment corresponds with (c) of the analysis and (3) of the indictment corresponds with (b) of the analysis.

That this slight change in the order of presentment of these allegations can have no effect upon its weight or sufficiency is entirely evident from the language of the Williams case (*quoad supra*).

That there are intervening clauses in a portion of the phraseology is equally immaterial and upon the same authority. The only test is whether the indictment as a whole "properly charges an offense against the laws of the United States" and if it does "that is sufficient to sustain it" and the rest is surplusage.

THE SECOND CHARGE OF INSUFFICIENCY.

With respect to the second charge of insufficiency, the court has found, in effect, if we correctly interpret its opinion in this regard, that the facts alleged in the

indictment, even assuming that the language correctly followed the statute, do not constitute embezzlement, nor do they sufficiently show a wrongful conversion of money or property which had come into the possession of the defendant in error or under his control in the execution of his office or employment.

As a reason for this conclusion, the court goes on to say (fol. 42, p. 22):

On the contrary, we have found that he rightfully came into the possession of the moneys charged to have been received by him, and that he did not convert such moneys to his own use except in so far as authorized by statute to take and hold possession of such moneys until a return and audit had determined his further duty with respect to these deposits.

The court then proceeds to the discussion of the Mason case (*U. S. v. Mason*, 218 U. S. 521) and quotes excerpts therefrom tending to show the personal interest in the fees and emoluments of the office of clerk of the District Courts in general arising from the fact that his salary and the expenses of his office are to be retained in his periodical accountings from the said fees and emoluments, the balance being remitted to the Treasury of the United States.

It is important to note that in the sentence in the opinion of the court previous to the one last above quoted, the court stated, "as we have already found they (the allegations of the indictment) do not

constitute embezzlement nor do they in our opinion show that the defendant wrongfully converted, etc."

The "already found" refers to the first and by far the greater portion of the court's opinion, but there he was discussing throughout and entirely (until he came to the discussion of the Government's second contention, to wit, that the defendant in error was guilty of a violation of section 97 of the Penal Code, the court's construction of which is the sole purpose of this writ) the provisions of section 99 of the Penal Code with respect to the duties and rights of the *clerk* and not the *deputy clerk* of the District Court of the Territory of Hawaii, and the ruling of this court with regard to the rights and duties of such a clerk as indicated from the Mason case.

The court's reference to the MacMillan case (*United States v. MacMillan*, 209 Fed. 266), the opinion in which was based upon the Mason case, gives further evidence of how utterly the court failed to take into account, in connection with its consideration of section 97 of the Penal Code, the fact that the defendant in error (in all counts of the indictment save the sixth) was described as a deputy clerk and not a clerk.

The court said:

The case [MacMillan case] appears to be an extreme one in favor of *the right of the clerk* to the exclusive and unqualified possession and use of all deposits made with him to secure the payment of costs until such time

as he makes his emolument return and an accounting is had as required by statute, but we are of the opinion that the decision is justified under the law as declared by the Supreme Court in the Mason case.

The learned court below, therefore, in its construction of section 97, having dismissed from its consideration the very essential fact that the section includes different classes of officers to whom it may be applicable, since it has failed to recognize any difference between the status of the clerk and the deputy clerk thereunder, which is the very crux of this controversy, has failed to sustain either of its two contentions set forth at the outset of this argument.

III.

The difference between the rights and duties of the clerk of the district court for the Territory of Hawaii and that of the deputy clerk of the same court was such as to take this indictment out of the doctrine of the Mason case. (U. S. v. Mason, 218 U. S. 517.)

The theory of the Mason case appears to be that the clerk of a district court has an interest (which may be described as unidentified) in the moneys deposited to cover fees to such an extent that he can not be said at any time to have embezzled any part thereof for the reason that his exact interest may not be discovered until the time set for his periodic accounting account arrives. Even then with respect to the amount payable over after the return has been made the law of the Mason case declares that "the clerk is not trustee but debtor." (218 U. S. 531.)

That is to say, when deposits of moneys are made by litigants to cover prospective fees, such deposits become either the property of the depositor, or the joint property of the United States and the clerk of the district court, owing to the latter's unidentified contingent interest therein.

It would seem, therefore, that under the statutes of the United States relating to embezzlement there is no remedy against such a *clerk* if he is guilty of actual misappropriation of such moneys. They may not, according to the *Mason* case, be properly described as "public moneys" or "money or property of the United States" within the meaning of the embezzlement statutes, as the fees and emoluments are not received by the clerk as moneys or property of the United States, but as the amount allowed to him (in the Territory of Hawaii) for his expenses and clerk hire, as appears *infra*.

The duties and rights of the clerk of the District Court of the United States Court for the Territory of Hawaii, particularly with reference to the moneys received by him as fees and emoluments, and the manner of his accounting therefor and the manner of his compensation with respect to the same, are fully set forth in the opinion of the District Court at Fols. 35-40, pp. 18-21 of the Record. And due reference is made to the case of *United States v. Mason*, 218 U. S. 517, where the statutes with respect to clerks' fees were duly discussed.

The statement of these conditions made by the District Court is correct save in one particular.

At Fol. 38 Circuit Judge Morrow, after referring to the act to provide a Government for the Territory of Hawaii and the provision therein authorizing the district judge to appoint a clerk for the District Court at a salary of \$3,000 per annum, says:

But this act does not relieve the clerk from the duty of making a quarterly return of his earnings in United States cases, nor from the duty of making the half-yearly emolument return of all fees and emoluments of his office; nor does it relieve the accounting officers of the Treasury from the duty of auditing and allowing the clerk over and above his personal compensation provided in the act his necessary office expenses including clerk hire; and the act does not require that deposits for costs shall be paid into the Treasury prior to such return and audit. The relation of the clerk to such deposits is therefore precisely the same in Hawaii as in other districts under the general statute in that behalf.

In this respect Circuit Judge Morrow was evidently misinformed. It is true that in all particulars except the payment of salary the procedure is similar to that applicable to the clerks of other districts as set forth by Judge Morrow in his opinion below. (Fols. 34-38, pp. 18-20 Record.)

That is to say, out of the fees and emoluments received from private litigants, the clerk pays the running expenses of his office including clerk hire (and his own salary in all districts except Hawaii), and in addition to fees charged to private litigants he charges against the United States fees for services rendered to

the Government. If at the end of six months the fees paid by private litigants do not equal in amount the sum actually expended by him in running his office, the clerk may make up the deficit so far as possible out of the fees charged against the United States. If the combined amount of fees paid by private litigants plus those charged against the United States does not equal the running expenses above mentioned, there is no provision for reimbursement. (218 U. S. 527.)

In Hawaii, however, it was anticipated that the fees and emoluments of the office would not cover both the expenses, including clerk hire, and the clerk's salary of \$3,000 a year. Hence as to that district the unique provision was made that the clerk's salary should be, and it has always been, paid by direct appropriation. (31 Stat. 141, 159.)

So much for the clerk of the District Court of the Territory of Hawaii and his rights and interests in the fees and emoluments received therein.

Now as to the deputy clerk it is immediately obvious that a very different situation obtained. He was appointed by the clerk upon a salary authorized by the Attorney General with permission to the clerk to deduct the amount of the deputy clerk's salary from the fees and emoluments of the clerk's office in the manner above outlined. (Act of Mar. 3, 1911; 36 Stat. 1087, § 4; Act of Feb. 26, 1853, § 3; 10 Stat. 166; R. S. § 839.) But if the amount of those fees and emoluments should prove insufficient, the deputy clerk must be paid the balance of his

salary out of the personal pocket of the clerk. Hence the deputy clerk could have no possible personal interest in the said fees and emoluments as it was entirely immaterial to him whether they were large or small. He looked to the clerk personally for his salary, and to the clerk alone. As far as the deputy clerk was concerned the fees and emoluments might have ceased absolutely.

As to the clerk, however, it was a very different matter, as has been shown *supra*. He was directly and personally interested in these fees and emoluments up to an amount which should reimburse him for his running expenses and clerk hire, since if that amount were not received, any deficit became at once a personal charge upon him. Any balance over and above that amount was turned over to the Government in his periodic statements and accounting in the manner above set forth.

It is apparent, therefore, that when the defendant in error received the moneys described in this indictment, in all counts except the sixth thereof, however "rightfully" they may have come into his possession, by virtue of his office, such moneys were not in any sense or by any possible legal fiction or as to any portion thereof the property of the defendant in error for the space of a single moment. They became at once the property either of the depositor, or the joint property of the United States, and the deputy clerk's superior officer, the clerk. As to which of these was to become the ultimate owner was none of his affair. He was bound to account

for these funds to the clerk, without regard to the clerk's rights and duties thereto or the provisions of the statute which regulated those rights and duties. And for his failure to so account he was personally responsible, not to the depositor, nor to the United States, but to the clerk who appointed him and to whom alone he might look for his own compensation.

It is respectfully submitted that it needs neither further illustration nor argument to demonstrate that the rights and duties of the defendant in error as deputy clerk, as he was described in all the counts of the indictment except the sixth, are so radically different from those of the clerk as to render the doctrine of the Mason case totally inapplicable to all counts of the indictment except the sixth, which is not pressed upon this writ.

CONCLUSION.

The order sustaining the demurrer should be affirmed as to the sixth count thereof, and as to the other eight counts it should be reversed and the case remitted to the District Court of the Territory of Hawaii for trial.

Respectfully submitted.

CHARLES WARREN,
Assistant Attorney General.

MARCH, 1917.

UNITED STATES *v.* DAVIS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE TERRITORY OF HAWAII.

No. 621. Submitted April 11, 1917.—Decided April 23, 1917.

When the trial court besides holding the indictment defective for not following the language of the statute bases its decision also upon the ground that the statute does not apply to the facts alleged the decision as to the latter ground is reviewable under the Criminal Appeals Act.

A deputy clerk of the District Court of Hawaii who converts to his own use fees deposited by litigants to secure the payment of costs in bankruptcy and other cases is punishable under § 97 of the Penal Code.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren for the United States.

No brief filed for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment of a deputy clerk of the District Court of Hawaii for converting to his own use moneys of

243 U. S.

Opinion of the Court.

persons other than the United States, deposited with the clerk to secure the payment of costs, by parties to proceedings other than proceedings in bankruptcy (counts 1, 3, 4, 7, 8) or by parties to proceedings in bankruptcy (counts 2, 5, 9). The sixth count charges the defendant, as clerk, with a like conversion. A demurrer to the indictment was sustained and the United States brings the case here. The judge assumed that the costs referred to in the several counts were fees of the clerk and, we presume, in case of proceedings in bankruptcy, fees collected for the referee and trustee, and also that the funds were funds to be accounted for by the clerk as debtor, not as trustee, under the decision in *United States v. Mason*, 218 U. S. 517, 531. He therefore was of opinion that the money was not within the purview of § 99 of the Penal Code, punishing the embezzlement of money belonging in the registry of the court, etc. The same reasoning led him to the conclusion that § 97 did not apply and it is the latter proposition that the United States seeks to have revised.

The judge objected that the charges in the indictment did not follow the language of § 97, but as he went on to consider whether the statute applied to the facts alleged we shall deal with the latter question. Concerning the sufficiency of the indictment in other aspects of course we have nothing to say. By § 97 "any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, . . . whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States," be fined or imprisoned or both. If, as assumed, the defendant was not punishable under § 99 he was punishable under this.

risk and that there was no evidence of negligence on defendant's part. This request being refused, the case was submitted to the jury under instructions which were not objected to; and a verdict was rendered for plaintiff. Defendant's exceptions to the refusal to direct a verdict were overruled by the Supreme Court. The case comes here on writ of error where only these same alleged errors may be considered.

The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No clear and palpable error is shown which would justify us in disturbing that ruling. *Great Northern Ry. Co. v. Knapp*, 240 U. S. 464, 466; *Baltimore & Ohio R. R. Co. v. Whitacre*, 242 U. S. 169, 171. The judgment is

Affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE McREYNOLDS dissent.
